

THE STATE
versus
BRIGHT LOVEJOY SAHUMANI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 1 & 2 June 2020

ASSESSORS : 1. Mr Gweme
2. Mr Nako

Criminal trial-murder

P. Gumbo, for the state
R.T. Nyarugwe, for the accused

CHITAPI J: The accused was charged with the crime of murder as defined in s 47 of the Criminal Law (Codification Reform) Act, [*Chapter 9:23*]. The charge alleged that on 25 December, 2018 at 1600hrs at Cheuchi Business Centre Chinhoyi, the accused unlawfully and intentionally stabbed Endasami Zhou with a knife on the head, stomach, left side of chest and back, thereby inflicting injuries from which the victim dies. The accused pleaded not guilty to the charges. The accused's *pro-deo* counsel on behalf of the accused tendered a guilty plea to culpable homicide. State counsel accepted the guilty plea to the reduced charge. The accused confirmed his guilty plea to culpable homicide.

Both counsel undertook to jointly prepare a statement of aggrieved facts which would constitute the admitted evidence in the case. The statement of agreed facts was produced as exh 1. Its contents read as follows:

“THE STATE AND DEFENCE HEREBY ENTER INTO STATEMENT OF AGREED FACTS
AND AGREE AS FOLLOWS:

1. The accused person will plead not guilty to the charge of Murder as defined by section 47 of the Criminal Law, Codification and Reform Act [*Ch 9.23*] but will plead guilty to a lesser

- charge of CULPBALE HOMICIDE as defined in section 49 of the Criminal Law Codification Act.
2. The accused person will admit causing the death of the now deceased ENDASAMU ZHOU however negligently while trying to defend himself.
 3. The accused person and the deceased were drinking beer at Cheuchi Business Centre, Chinhoyi.
 4. Hardlife Sengu and the deceased confronted the accused person and his brother one Prince Chakwezera over allegation of bullying.
 5. An altercation arose between the four and HARDLIFE SENGU threw a stone which hit the accused person at the upper left eye brow.
 6. The accused and his brother fled the scene.
 7. The deceased and Hardlife Sengu hot pursued the accused and his brother and caught up with the accused at about 60metres from the scene. Prince Chakwezera was in front and how was not caught.
 8. A scuffle ensued between HARDLIFE SENGU, THE DECEASED AND THE ACCUSED PERSON. Accused picked up a knife and stabbed the deceased four times which resulted in his death.
 9. The parties agree that the cause of death was as per post mortem report filed of record.”

In addition to the agreed facts there was produced by consent, a post mortem report prepared following the examination of the remains of the deceased at Chinhoyi Provincial Hospital on 28 December, 2018 by Doctor Mawire. The doctor observed multiple stab wounds which he recorded as follows

- (i) One in posterior right chest
- (ii) One is subcombilial area of abdomen with bowel protruding through the wound.
- (iii) One in the left lateral chest involving the left lung which looked collapsed.
- (iv) One on the left frontal aspect of the head.

The cause of death was recorded as:

“cardio respiratory failure from Haemorrhage and lung puncture secondary to multiple stab wounds.”

The court was satisfied that the deceased died of unnatural but human inflicted injuries. The agreed facts explained how the accused had inflicted the injuries which led to the death of the deceased. A verdict of not guilty to murder but guilty to culpable homicide was returned.

In mitigation of sentence the defense counsel submitted that there was no premeditation to commit the offence on the part of the accused. The deceased and his colleague Hardlife Sengu was the one who first confronted the accused over allegations that the accused and his brother Prince Chakwezera were behaving like bullies. The confrontation degenerated into a fight involving the

quartet of the accused, the deceased, Hardlife Sengu and Prince Chakwezera. The accused was struck with a stone on the upper left eye brow by deceased's colleague, Hardlife Sengu. The accused and his brother then removed from the scene but were pursued by the deceased and Hardlife Sengu for about 60 metres. Prince Chakwezera successfully made good his escape but the accused was caught and another scuffle ensued. The accused was outnumbered two to one. The accused then picked up a knife and used it to inflict on the deceased the injuries described in the post mortem report. The court accepted that there was no premeditation by the accused.

It was submitted that the accused was provoked. The court had some difficulty in appreciating the scope, nature and extent of the provocation. It is not sufficient for an accused to simply allege provocation without outlaying its foundation. Whether or not there has been provocation is a question of fact. It is from the facts that found or support the provocation that the court can reach an informed decision as to whether there was provocation brought to bear on the accused and the proportionality of the accused's reaction to the provocation. In terms of the provisions of s 239 of the Criminal Law (Codification and Reform) Act, it is the duty of the court to determine whether or not the accused was provoked. The accused relying on provocation whether in rebutting *mens rea* or as a mitigatory fact must establish the provocation on a balance of probabilities.

For the avoidance of doubt, the provisions of sub s (2) of s 239 aforesaid read as follows:

- “(2) For the avoidance of doubt, it is declared that if a court finds that a person accused of murder was provoked but that-
- (a) He or she did have the intention or realization referred to in section forty-seven; or
 - (b) The provocation was not sufficient to make a reasonable person in the accused's position and circumstance lose his or her self-control;

The accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section two hundred and thirty eight.”

It is clear therefore that it does not follow that an allegation by the accused that he was provoked will be accepted at face value. The facts of the case must show that the accused was provoked by proven conduct which would reasonably make a reasonable person in the same circumstances as the accused to be provoked and lose self- control. It is also a decision which rests on the court to determine whether the provocation if proved would affect the *mens rea* of the accused or simply be regarded as a mitigatory factor.

In *casu*, there were no facts or evidence of provocation placed before the court other than that the deceased and Sengu upon approaching the accused asked him about allegations of bullying which the accused was allegedly involved in. The accused did not state as to why and how such an enquiry would result in provocation. The accused could simply have denied the allegation. In the view of the court, provocation was only mentioned but not proven or established. In the absence of establishing provocation by acceptable evidence, the mere allegation that the accused were provoked is not sufficient to prove provocation. The court could not find provocation as proven by the accused on a balance of probabilities.

In the view of the court, the facts suggest a scenario which in all probability was punctuated by egos of the parties, the accused and Prince on one hand and the deceased and Sengu on the other hand. The very fact of the deceased approaching the accused accusing him of being a bully shows that the deceased considered himself as able to stand his ground. The whole incident smacks of a show of bravado by the persons involved in the fighting. The incident took place at a business centre where the accused and deceased were drinking beer. Although counsel did not address the issue of intoxication, the accused, deceased and their colleagues who became involved in the fracas must have had their minds affected by beer. Whilst the court cannot say to what extent beer played a part, what is clear is that beer affects the mind and in turn how the person who has taken beer behaves. The court takes this fact into consideration as a mitigatory circumstance. The fact that the minds of the persons were affected by beer was shown by the fact that even after the accused had fled the scene, the deceased pursued after them. A reasonable person does not pursue an antagonist who has fled from a fight.

What is important to consider in this case is the degree of negligence exhibited by the accused. The accused at the critical time was outnumbered two to one. It seems that he decided to hold his ground and use a knife which he “picked up.” There was nothing said to show that he could not escape other than to use the knife. He inflicted life threatening wounds on delicate parts of the deceased’s body, the head, chest and stomach. Severe force was used because the stab wound to the stomach opened it up and the deceased’s bowels protruded therefrom. The degree of negligence was high and multiple injuries were inflicted by use of a dangerous weapon.

The sanctity of human life should be emphasized. The use of a dangerous weapon makes the offence serious. The accused was 26 years old and relatively a youth. He is a first offender

whom courts have sympathy for. He however but he started crime at the deep end in that his first offence and the manner of its commission calls for a deterred sentence on him and society at large. A custodial sentence is called for. The accused has been in custody for 18 months. This fact has been taken into account in mitigation. Every sentence in cases where the accused has caused the death of another whether intentionally or negligently should reflect society's abhorrence for such conduct. A greater part of the sentence will be suspended on conditions of good behaviour. The accused is sentenced as follows

5 years imprisonment. 2 ½ years imprisonment is suspended for 5 years on condition that the accused is not within that period convicted of any offence of negligently causing the death of another person or an offence involving assault for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, applicant's legal practitioners
Ushewokunze Law Chamber, accused's legal practitioners (pro-deo)